ANANDAGODA v. THE QUEEN

[P.C. (Lord Tucker, Lord Hodson, Lord Guest, Lord Devlin and The Rt. Hon. L. M. D. de Silva) April 4; May 22, 1962]

[Privy Council Appeal No. 27 of 1961]

Criminal Law and Procedure — Murder — Whether admission a "confession".

Evidence — Admissions to police officer — Whether a "confession" — Objective test — Admission in the context expressly or inferentially admitting guilt — Evidence Ordinance (Ceylon Cap. 11), ss.17(1), (2) and 25.

In this case the appellant was tried, together with two others, with conspiracy to murder and with murdering the deceased by running over her with a motor car. At the close of the case for the prosecution the indictment against one accused was withdrawn and both the appellant and the other accused were found not guilty on the conspiracy charge, while on the other charge of murder the appellant was found guilty but the other accused not guilty. The appellant gave no evidence and called no witnesses. The prosecution had adduced evidence of certain admissions which had been made to a police officer by the appellant. On appeal, the appellant submitted, *inter alia*, that those statements did give rise to an inference or inferences prejudicial to him, or suggested the inference that he committed the offence on which he had been found guilty, and that they therefore constituted a "confession" within the meaning of sections 25, 17(1) and (2) of the Evidence Ordinance and were wrongly admitted in evidence.

Held, dismissing the appeal: the test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt? Here there was no admission that the appellant was driving the car at the time of the offence or that, if he was driving it, that in running over the deceased he was acting deliberately, which would both be necessary elements to constitute murder. The statements considered by themselves did not therefore amount to a confession of guilt within the meaning of section 17(2) of the Ordinance, and the evidence of the police officer was accordingly properly admitted.

Held further: there was no inconsistency in the verdict of the jury in finding both accused not guilty on the charge of conspiracy and the second accused not guilty and the appellant guilty on the charge of murder. The jury could consistently with the verdict of not guilty on the charge of conspiracy find the appellant guilty of murder. If they thought the second accused was not implicated in the conspiracy they had no alternative but to find both accused not guilty on that charge.

Cases referred to:—

(1) *The King* v. *Kalu Banda* (1912) 15 N.L.R. 422.

(2) *Weerakoon* v. *Ranhamy* (1926) 27 N.L.R. 267.

(3) *The King* v. *Cooray* (1926) 28 N.L.R. 74.

(4) *Seyadu* v. *King* (1951) 53 N.L.R. 251, 253.

(5) *Dal Singh* v. *King-Emperor* (1917) L.R. 44 I.A. 137; 33 T.L.R. 249, P.C.

(6) *State* v. *Porter* (1879) 32 Or. 135; 49 Pac. 964.

The following cases were also cited in argument: *Pakala Narayana Swami* v. *King-Emperor* [1939] M.L.J. 59; 66 I.A. 66; *Rex* v. *Ukku Banda* (1923) 24 N.L.R. 327, 425; *The King* v. *Gunawardene* (1914) 42 N.L.R. 217; *The King* v. *Fernando* (1939) 41 N.L.R. 151; *The King* v. *Haramanisa* (1944) 45 N.L.R. 532; *King* v. *The Queen* [1962] 2 W.L.R. 301; [1962] 1 All E.R. 816; *The King* v. *Attygalle* (1934) 37 N.L.R. 60; *Attygalle* v. *The King* [1936] A.C. 338; [1936] 2 All E.R. 116; *Obiyas Appuhamy* v. *The Queen* (1952) 54 N.L.R. 32; *Reg* v. *Batcho* (1955) 57 N.L.R. 100; *Reg* v. *Buddharakkita Thero* (1961) 63 N.L.R. 43.

PRIVY COUNCIL APPEAL by special leave from a judgment of the Ceylon Court of Criminal Appeal.

Ralph Millner for the appellant.

E. F. N. Gratiaen, Q.C. (Ceylon), *L. B. T. Premaratne* and *T. O. Kellock* for the Crown.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellant was tried, together with two other accused, upon an indictment which charged all three accused with two offences, viz., conspiracy to murder and murder, in terms as follows:

" (i) That between the 2nd day of March, 1959, and the 15th day of March, 1959, at Timbiriwewa, in the division of Anuradhapura, within the jurisdiction of this court, and at Kalutara, Kalawellawa, Colombo, Puttalam and other places, you did agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, to wit, the murder of one Adeline Vitharana and that you are thereby guilty of the offence of conspiracy for the commission or abetment of the said offence of murder in consequence of which conspiracy the said offence of murder was committed and that you have thereby committed an offence punishable under section 296 (murder) of the Penal Code read with sections 113B (conspiracy — punishable as for abetment) and 102 (abetment) of the said Code.

(ii) That on or about the 14th day of March, 1959, at Timbiriwewa, within the jurisdiction of this court, you did in the course of the same transaction commit murder by causing the death of the said Adeline Vitharana and that you have thereby committed an offence punishable under section 296 of the Penal Code."

The appellant was the first accused. The indictment against the third accused, A. Isiman Silva, alias Sirisena, was withdrawn by the Crown at the close of the prosecution case. Both the appellant and the second accused, T. D. Allis Singho, alias T. D. Podisingho Perera, were found not guilty on the first count of conspiracy by a unanimous verdict of the jury. On the second count of murder the appellant was found guilty by a majority verdict of 6 to 1, and the second accused was found not guilty by a majority verdict of 5 to 2.

In the course of a lengthy trial, in which 110 witnesses were called by the prosecution, the following facts (as set out in the judgment of the Court of Criminal Appeal) were deposed to:—

" Late at night on March 14, 1959, the dead body of a woman was discovered lying at Timbiriwewa near the 27th mile-post on the road between Puttalam and Anuradhapura. A post-mortem examination conducted on March 16, 1959, revealed that the woman was between 20 and 25 years of age, that she had been about seven months advanced in pregnancy, and that her body bore numerous injuries consistent with her having been run over by a motor-car. The case for the prosecution was that the dead body was that of Adeline Vitharana, that

her death had been caused by a motor-car being deliberately driven over her body at least twice, that the consequent injuries were the cause of her death, and that death had occurred between 11 p.m. and midnight on March 14, 1959. It was not contended on appeal that it was in any way unjustifiable for the jury to decide upon the evidence either that the identity of the dead woman had been proved, or that she had been killed in the manner and at the time and place asserted by the prosecution.

The prosecution called witnesses who deposed to the following matters, *inter alia*:—

'(a) That the appellant had, under a name different to that by which he was ordinarily known, been acquainted with Adeline, an intelligent and attractive young woman, from about November, 1956; that he was the father of an illegitimate child born to Adeline in August, 1957; that he had thereafter promised to marry her, and that he had communicated with her under his assumed name and received letters from her at an accommodation address furnished by him.

(b) That the appellant had been on friendly terms with a family of better social status than that of Adeline's relatives; that he occasionally stayed at the home of that family, and that it was apparent that he proposed to contract a marriage with the young daughter of that family.

(c) That the appellant had been the owner of a Fiat car No. 1 Sri 6265, and that, although there was a change of registration in January, 1959, he had continued thereafter to be the actual user and the virtual owner of that car.

(d) That Adeline, on January 19, 1959, after discovering the true identity of the appellant, wrote to the headmaster of the school at Kalutara at which the appellant was employed as a teacher, alleging that the appellant was the father of her child and had promised to marry her, and expressing her intention to represent matters to the Director of Education; that this letter was shown thereafter to the appellant by the Principal of the school.

(e) That Adeline left her home at Katugastota on March 2, 1959, having expressed her intention to see her father and to meet the appellant at Kalutara in order to obtain some money from him.

(f) That on March 2, 1959, a young woman, apparently pregnant, was seen near the fence of the school at Kalutara, that a message given by the young woman was delivered to the appellant in the school, and that he afterwards came in a car and took her away; that a young woman identified as Adeline was seen later on the same day at the village of Kalawellawa and had resided for a few days in that village with the family of one Alo Singho; and that the appellant himself had been seen in his car in that village; at least on one occasion with Alo Singho and on another in the village bazaar.

(g) That the appellant on one occasion stopped his car close to Alo Singho's house and sounded his horn, whereupon Alo Singho came up to the car and after speaking to the appellant returned to his house; that shortly thereafter Adeline came to the car dressed in a saree and left in the car with the appellant and the second accused, taking with her a black handbag and an umbrella. There was little room for doubt, having regard to his evidence, that the witness who deposed to these facts spoke of an incident which took place on Saturday, March 14, 1959.

(h) That the second accused, a person well-known to the appellant, was a brother of Alo Singho, who has been referred to above.

(i) That the appellant drove a car similar to the car No. 1 Sri 6265 to a petrol station at Horana in the afternoon of March 14 with the second accused and a woman, and purchased petrol there; that on the night of March 14 at about 9 or 9.30 p.m. the appellant and the second and third accused had come to an hotel in Puttalam in the company of a young woman dressed in a saree and that dinner had been served to them.

(j) That the appellant had, probably on March 12, 1959, tried to obtain a car on rent from a hire service in Colombo for use on March 14 and 15, and that because a car was not available for the 14th, he had rented a car for March 15 and used it on that day to make a journey of 277 miles, thus rendering it possible that he could on the 15th have made a trip to the place where the body was found.

(k) That despite the fact that the appellant's car had been serviced on March 16 and the undercarriage cleaned with penetrating oil, four hairs similar to (though not shown to have been identical with) Adeline's hair were found adhering to the undercarriage when the car was later examined'."

The appellant gave no evidence and called no witnesses.

In addition to the above evidence, the prosecution adduced evidence by a police officer, Inspector Dharmaratne, who said that the appellant made certain admissions to him while in his charge at Anuradhapura police station on March 22, 1959. The evidence of the inspector on this point was as follows:

" (Q.) And at about 10.10 a.m. on March 22 the first accused [i.e., the appellant] made a statement to you? (A.) Yes. (Q.) Did the first accused tell you his relationship with Adeline Vitharana? (Mr. Saravanamuthu [counsel for the appellant] objects. Overruled.) (A.) Yes, he told me that Adeline Vitharana was his mistress for about two or three years and she has a child by him. (Q.) Did he tell you anything about any request made to him by Adeline Vitharana? (A.) Yes. He said that Adeline was insisting that he should get married to her but he was putting it off. (Q.) Did he tell you what Adeline Vitharana's attitude to him after that was? (A.) He said that Adeline Vitharana was disgracing him and that she was an unbearable nuisance to him. (Q.) Did he tell you anything of what happened on March 2, 1959? (Mr. Saravanamuthu: I object on the ground that it is a leading question. Court: I do not think it is. I overrule that objection.) (A.) He said that Adeline Vitharana came and saw him at Kalutara on March 2 and that he took her to Kalawellawa on that day and left her in the house of Podisingho. No. I am sorry. (Mr. Saravanamuthu: I object to the reference to the book.) Court: (Q.) How can you object? (A.) He said he left her at a place at Kalawellawa. (Q.) Did he tell you where he was on March 14, 1959? (A.) He told me that on March 14 he started in his car with Adeline Vitharana, the second accused Podisingho for Anuradhapura via Puttalam. They reached a Muslim hotel at Puttalam between 8 and 9 p.m. (Q.) Did he tell you what he did on March 15? (A.) Yes. He said he got a red Vanguard from Avis motors and came to Anuradhapura via Puttalam with his watcher Sirisena. (Q.) Did he tell you where he was about 3 or 3.30 p.m. on March 15? (A.) Yes. He said he passed the scene of murder. (Mr. Saravanamuthu objects.) (Q.) That is the place where the body was? (A.) Yes. (Q.) Please refresh your memory? (A.) He said that he passed the body of Adeline Vitharana and that he slowed down and noticed people and police officers there."

The appellant submitted that those statements were wrongly admitted in evidence, because they gave rise to an inference or inferences prejudicial to the appellant, or suggested the inference that he committed the offence of which he was found guilty, and they therefore constituted a confession or confessions within the meaning of the relevant provisions of the Evidence Ordinance, namely:—

Section 25. "No confession made to a police officer shall be proved as against a person accused of any offence."

Section 17. "(1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.

(2) A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence."

On April 4, Lord Tucker announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons at a later date. On May 22 the judgment of their Lordships giving their reasons for dismissing the appeal was delivered by, —

Lord Guest (who stated the facts set out above and continued): There has been a certain divergence of opinion in the courts of Ceylon as to the meaning to be given to the word "confession" as used in section 25. In *The King* v. *Kalu Banda* [1] the accused set up the defence that he was acting in self defence and at the trial a police officer gave evidence that the accused had made a certain statement but that he did not say anything about having been attacked or threatened. The court held the evidence was inadmissible under section 25 as it in substance amounted to a confession. Their Lordships have no criticism to make of the result of the decision as it would be manifestly unfair to the accused to allow evidence of a "confession" without its contents. But Lascelles C.J. stated (p. 425):

> "It was recognised that police officers in Ceylon, as in India, are not always proof against the temptation of deposing that the accused made some statement the effect of which is to strengthen the case for the prosecution, or to clinch the charge against the accused."

If this is interpreted as stating the object of the legislature in making confessions inadmissible their Lordships do not consider it well founded. In a later case of *Weerakoon* v. *Ranhamy* [2] the accused was charged with voluntarily causing hurt. In a statement to a police officer the accused denied the cutting and said that the injured person got cut accidentally. The statement was held to be inadmissible. Branch C.J. again referred to the policy of the legislature in these words (p. 268):

> "The legislature desired to prevent the reception of any evidence by police officers as to statements made to them by accused persons which would either bring home the charge to the accused or strengthen the case for the prosecution and full effect must be given to that intention," and later said: "It may easily happen that the evidence of a police officer as to statements made to him by accused persons may at the commencement of the trial appear entirely innocuous, but during its subsequent course that evidence may clinch a charge against the accused or it may influence a man in setting up a defence which cannot be sustained. There can be no doubt as to the kind of mischief the enactment seeks to avoid."

Their Lordships are of opinion that the above statements do not correctly interpret the meaning to be attributed to the word "confession" in section 25. They consider that the correct view was taken by Garvin A.C.J. in *The King* v. *Cooray* [3] when he stated (p. 79) after quoting section 17 of the Evidence Ordinance:

> "The term 'admission' is the genus of which 'confession' is the species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement made by a person accused of an offence whereby he states that he committed that offence or which suggests not any inference but the inference that he committed that offence."

Their Lordships do not consider that it is necessary to draw the distinction made by the Court of Criminal Appeal in this case between "facts in issue" and "relevant facts" which are to be found in section 17(1). The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts. In this connection their Lordships consider that the view expressed by Gratiaen J. in *Seyadu* v. *King* [4]:

> "The test of whether an 'admission' amounts to a 'confession' within the meaning of section 17(2) must be decided by reference only to its own intrinsic terms"

is correct. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even although the accused at the same time protests his innocence. Support for these views can be obtained from the judgment of the Board in *Dal Singh* v. *King-Emperor* [5] when Lord Haldane held that a statement by the accused in which he stated, *inter alia*, that he was at the scene of the crime was in no sense a confession. Unless section 17 is given this restricted meaning, it would be impossible to draw the line between non-confessional statements and confessions. If any admission by an accused of a relevant fact or fact in issue is to be inadmissible then it is difficult to understand why the legislature qualified "confession" in section 17(2) as being a statement of the commission of an offence or a statement suggesting the inference of the commission of an offence. It would have been a simple matter to make all admissions by accused persons inadmissible in evidence. The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt? A useful definition of a "confession" is to be found in *Wigmore's* Law of Evidence (America) I. Section 821, p. 930, quoting from a judgment of Wolverton J. in *State* v. *Porter* [6]:

"We take it that the admission of a fact, or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or, as put by Mr. Wharton, '"I am guilty of this"; and this imports the admission of all the acts constituting guilt.' It is necessary, however, that the accused should speak with an animus confitendi, or an intention to speak the truth touching the specific charge of guilt; and when he, with such intention, narrates facts constituting a crime, the guilt becomes matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime, then the facts admitted import guilt, and such admissions may properly be denominated confessions."

Their Lordships therefore consider that there is no ground for criticism of the test which the Court of Criminal Appeal applied in examining the appellant's statements. If the statements are considered by themselves, they do not, in their Lordships' opinion, amount to a confession of guilt within the meaning of section 17(2). There is no admission that the appellant was driving the car at the time of the offence or that if he was driving the car that in running over the deceased the appellant was acting deliberately, both of which elements would be necessary to constitute the crime of murder. In their Lordships' view the evidence was properly admitted.

The appellant also argued that the trial judge ought to have acceded to a motion made by the appellant's counsel at the commencement of the trial for a separate trial in view of the damaging nature of a statement made by the second accused in which he implicated the appellant while exonerating himself. The question of a separate trial was for the discretion of the trial judge and he was no doubt influenced by the fact that the first count in the indictment was one of conspiracy. No criticism was made of the judge's summing up in which he warned the jury that the second accused's statement was not evidence against the appellant. Their Lordships are unable to say that the judge exercised his discretion wrongly in refusing a separate trial.

It was also urged for the appellant that there was inconsistency in the jury's verdict in finding both accused not guilty of the first count and the second accused not guilty and the appellant guilty of the second count. The argument was that the words "in the course of the same transaction" in the second count referred to the first count and that the accused could not commit murder in the course of a transaction of which he had previously been found not guilty. Their Lordships cannot agree that because the appellant was found not guilty of conspiracy to murder that the jury could not consistently with that verdict find him guilty of murder. If they thought the second accused was not implicated in the conspiracy they had no alternative but to find both accused not guilty of the first count. In finding the accused guilty on the second count they may have been influenced by the appellant's statements and the other evidence already referred to. There is, in their Lordships' opinion, no inconsistency.

The appellant's counsel finally submitted that the statements by the appellant to Inspector Dharmaratne were inadmissible under the provisions of section 122(3) of the Criminal Procedure Code. Section 122(1), (2) and (3) is in the following terms:

"122. (1) Any police officer or inquirer making an inquiry under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined, but no oath or affirmation shall be administered to any such person, nor shall the statement be signed by such person. If such statement is not recorded in the Information Book, a true copy thereof shall as soon as may be convenient be entered by such police officer or inquirer in the Information Book.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) No statement made by any person to a police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial."

This point was not taken in the Ceylon courts and appeared for the first time in the appellant's printed case. Their Lordships declined to allow appellant's counsel to argue the point. Before a statement becomes inadmissible under section 122 it must have been made "to a police officer . . . . in the course of any investigation" under Chapter XII, which is headed "Investigation of Offences." Section 121 lays down the procedure to be followed where cognizable offences are suspected and the investigation is to be made by an officer in charge of a police station. There is in their Lordships' view insufficient material to enable them to say whether Inspector Dharmaratne, to whom the statements were made, was conducting an investigation under Chapter XII. Their Lordships therefore felt themselves unable to consider the admissibility of these statements in the absence of the necessary evidence to show that section 122(3) was applicable. Their Lordships express no opinion as to whether if section 122(3) did apply the statements would have been inadmissible.

Their Lordships have humbly advised Her Majesty that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Darley, Cumberland & Co.; T. L. Wilson & Co.*